Supreme Court, U.S.
FILED

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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GABOVITCH, ETC.,
PETITIONER,

v.

MAURICE SHEAR, ET AL.,
RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Whether a complaint invoking the right to a civil remedy under the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1964, is barred by prior litigation in state court for common law fraud and other misconduct of the various parties in related activities.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, William Gabovitch, acting pro se, prays that a writ of certiorari issue to review the judgment and opinion of the Uited States Court of Appeals for the First Circuit in these proceedings on November 21, 1995.

OPINION BELOW

The Judgment and Opinion of the Court of Appeals, unpublished, appears in the Appendix hereto. No Opinion was rendered by the District Court for the District of Massachusetts.

JURISDICTION

The Judgment of the Court of Appeals for the First Circuit was entered on November 21, 1995 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article VI, Clause 2:

> "This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; . . .".

Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of . . . property, without due process of law; . . .".

United States Code, Title 18:

> 1964 Civil remedies.
>
> "(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

> 1962 Prohibited activities.
>
> (c) "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . .".

Fed. R. Civ. P. 1
Fed. R. Civ. P. 8(a)
Fed. R. Civ. P. 8(f)
Fed. R. Civ. P. 9(b)
Fed. R. Civ. P. 26

THE PARTIES

1. Plaintiff William Gabovitch ("Gabovitch"), who resides at 33 Old Nugent Farm Road, Gloucester, Massachusetts, is and was at all relevant times a certified public accountant and a nonpracticing member of the Bar of the Commonwealth of Massachusetts. He is the senior partner of William Gabovitch & Company, Certified Public Accountants, with a principal place of business at 148 State Street, Boston, Massachusetts. Since 1979, he has served in approximately 50 cases as a federal bankruptcy trustee (26 cases), examiner, independent counsel, arbitrator, and investigative accountant, as well as state court receiver. From 1960 to 1970 he taught Legal Accounting and Advanced Taxation at Boston College Law School.

2. Defendant Maurice Shear, also known as "Murray" Shear, resides at 1100 Salem Street, Suite 14, Lynnfield, Massachusetts, and in North Miami Beach, Florida. Murray Shear is the settlor and original sole trustee of the NMI and Shear Family Trust ("SFT"). He is a five time convicted felon.

3. Defendant Bruce A. Shear ("Bruce" or "Bruce Shear") is the son of Maurice Shear and Gertrude Shear, residing at 14 Ida Road, Marblehead, Massachusetts. Bruce is, together with his brothers Steven and Eric, a contingent remainder beneficiary of NMI and SFT. He is also president, chief executive officer, and principal stockholder of P.H.C., Inc.

4. Gertrude Shear (also known as "Trudy" Shear), the wife of Maurice Shear, is the contingent life beneficiary of the NMI and Shear Family Trusts. Gertrude Shear resides at 1100 Salem Street, Suite 14, Lynnfield, Massachusetts, and in North Miami Beach, Florida.

5. Defendant William F. Grieco ("Grieco") is a lawyer licensed to practice in Massachusetts, residing at 115 Marlborough Street, Boston, Massachusetts. He specializes in hospital law and is a partner in the law firm of Choate, Hall & Stewart, 53 State Street, Boston, Massachusetts.

6. Defendant Brian A. Davis ("Davis") is a lawyer licensed to practice in Massachusetts. He specializes in litigation and is a partner in the law firm of Choate, Hall & Stewart, 53 State Street, Boston, Massachusetts.

7. Defendant Choate, Hall & Stewart is a law partnership of individuals and professional corporations consisting of about 150 lawyers with a principal place of business at Exchange Place, 53 State Street, Boston, Massachusetts. Defendant Choate, Hall & Stewart is liable under partnership law for the loss or injury caused to the Plaintiff by the wrongful acts and omissions, set forth herein, of Grieco and Davis acting in the ordinary course of the partnership business or with the authority of their co-partners. Grieco and Davis, as well as Todd, have acted as interim successor trustees pending appeal of the removal of Gabovitch.

8. Defendant J. Owen Todd ("Todd") is a lawyer licensed to practice in Massachusetts, residing at 274 Beacon Street, Boston, Massachusetts. He resigned his previous position as a Superior Court judge after three years to pursue private practice as a partner in the law firm of Todd & Weld, 1 Boston Place, Boston, Massachusetts.

9. P.H.C., Inc. ("PHC"), is a Delaware corporation, specializing in health-related services, with its principal place of business located at 36 Commerce Way, Woburn, Massachusetts. PHC and Bruce Shear, as its principal officer, were convicted of securities fraud.

STATEMENT OF THE CASE

This case originated as an action seeking damages, injunctive relief, and other relief authorized under applicable state and federal law, including Title IX of the Organized Crime Control Act of 1970 (as amended at 18 U.S.C. §§ 1961 et seq.), commonly known as the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Jurisdiction of this action was predicated upon 18 U.S.C. § 1964, and upon 28 U.S.C. § 1331.

Venue in the District of Massachusetts was proper under 18 U.S.C. § 1965 and 28 U.S.C. § 1391.

The principal and threshold issue in this petition is as follows:

Whether a plaintiff, in his individual and/or fiduciary capacity, is estopped from pursuing a federal private RICO civil action due to state court dismissals (currently on appeal) of his common law complaints for fraud and other misconduct if arising out of a related nucleus of operative facts and continuing course of conduct of various of the parties defendants.

The details of the state court litigation are as follows:

On April 22, 1994, Plaintiff Gabovitch filed in the Probate and Family Court of the Commonwealth of Massachusetts a Verified Complaint seeking to redress and to enjoin the wrongful activities of the Interim Successor Trustees. The Probate and Family Court on June 23, 1994, dismissed the Verified Complaint without ever conducting any evidentiary hearing or making any inquiry, determination, or ruling concerning the merits of the allegations of the Verified Complaint. An appeal is presently pending concerning the refusal of the Probate and Family Court to consider the allegations of Gabovitch. No claim was asserted under RICO in the Verified Complaint.

On September 27, 1994, Gabovitch filed in the Superior Court of the Commonwealth of Massachusetts a Complaint for Relief From Judgment, Order, and Proceedings seeking to vacate and obtain other relief with respect to the (a) judgment removing and surcharging Gabovitch and Woodrow, (b) orders appointing the Interim Successor Trustees, (c) order releasing from escrow over $230,000 in funds paid into court by Gabovitch and Woodrow, and (d) order dismissing Gabovitch's Verified Complaint. No claim, again, was asserted under RICO in the Verified Complaint and an appeal is also still pending in said action. No discovery has been available nor any evidentiary hearings or rulings on the merits of either of the cases.

While the U.S. Court of Appeals assumed in its opinion (page 13 herein) that these actions were "all without avail", it also determined that they are merely extensions of RICO claims of standing and would serve to "federalize" common law fraud. Therefore, the effect of this opinion of the court below would hold that judgments of state courts having no RICO statute would, in cases charging common law fraud, give rise to the defenses of res judicata, collateral estoppel, issue and claim preclusion to complaints against racketeer influenced and corrupt organizations. In short, the state court fraud litigation would be deemed a parallel proceeding to the RICO claim, so intended by Congress in enacting the RICO statute.

Thus we do not raise the issues here and now as to:

(1) Whether the plaintiff has a legal or an equitable interest (analogous to the equity of redemption), pending appeal of his removal as a trustee, to bring to the attention of the courts as a creditor, officer of the court or "private attorney general" the fraud and other misconduct of the defendants.

(2) Whether, under the General Rules of Pleading, Fed. R. Civ. P. 8(a) and 8(f), the plaintiff's complaint was legally sufficient in terms of notice pleading as well as the requirements of Fed. R. Civ. P. 9(b).

(3) Whether this RICO action constitutes a "second bite at the apple" or the court is comparing apples with oranges as to the state court litigation versus this RICO action. (See footnote 2 on page 12 herein.)

(4) Whether, in this same footnote, the Court correctly assumes that events subsequent to the state court litigation cannot disclose for the first time the fraudulent nature of affidavits to the court. This is the essence of fraud perpetrated on the court, namely, it is discovered after trial and final judgment. The essence of criminal activity is secrecy which cannot always be uncovered by the most diligent discovery efforts and can sometimes only come to light unexpectedly by subsequent events.

(5) Whether the allowance of motions to dismiss a claim, without the opportunity to amend or develop more specificity by even limited discovery, is a violation of due process of law under the Fifth Amendment to the United States Constitution. The very first rule of civil procedure, Fed. R. Civ. P. 1, mandates that the Scope and Purpose of Rules "be construed and administered to serve the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 26 covering the General Provisions Governing Discovery; Duty of Disclosure is a most important device to effectuate that purpose.

(6) Whether to correct the Court's misunderstanding expressed in footnote 1 of its opinion and explain that the plaintiff and his co-trustee sold the trusts' one-third *stock interest in the hospital*, which cost $1,000, for $3,000,000 consisting of $2,000,000 cash and a $1,000,000 purchase money mortgage on the real estate. After 38 monthly payments, the mortgage went into default and the plaintiff and his co-trustee took possession, foreclosed on the property and thus eventually acquired a perfected *ownership of the hospital real estate* in 1991.

(7) Whether fraud perpetrated on the court is different from any other fraud in constituting part of a pattern of racketeering activity prohibited by 18 U.S.C. § 1962.

(8) Whether, even if perjury should be determined not to constitute a predicate act, it has probative value as evidence of a pattern of racketeering activity in the light of additional alleged means of perpetrating the predicate acts as itemized in the complaint.

Thus, the effect of the Court's opinion is to render all these concerns and issues moot, "to no avail" and "—futile", thereby unjustly depriving the plaintiff of his day in court and the opportunity to present evidence obtained, and to be obtained, subsequent to any previous state court litigations.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals has decided an important question of law which has not been, but should be, settled by the court namely:

1. Whether the Supremacy Clause of the United States Constitution allows state court proceedings to estop and deny the application of federal legislation such as the RICO statute.

2. Whether due process of law requires that any proceeding brought in accordance with a federal statute be adjudged on its own terms and not be prejudiced or preempted by events in other forums.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the U.S. Court of Appeals for the First Circuit.

Respectfully submitted,

WILLIAM GABOVITCH, *Esq.*
B.B.O. # 181960
Suite 500
148 State Street
Boston, Massachusetts 02109
Petitioner acting pro se

February 13, 1996

[NOT FOR PUBLICATION]

United States Court of Appeals
For the First Circuit

No. 95-1055

WILLIAM GABOVITCH, ETC.,
PLAINTIFF, APPELLANT,
v.
MAURICE SHEAR, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WILLIAM G. YOUNG, *U.S. District Judge*]

Before

TORRUELLA, *Chief Judge*,
STAHL AND LYNCH, *Circuit Judges*.

William Gabovitch on brief pro se.
Brian A. Davis, *Julie B. Brennan*, and *Choate, Hall & Stewart* on brief for appellees.

November 21, 1995

Per Curiam. Pro se plaintiff William Gabovitch, a certified public accountant and non-practicing attorney, served for nearly eighteen years as a co-trustee of two irrevocable inter vivos trusts created by Maurice Shear. In 1992, in connection with litigation filed in 1987 by Gertrude Shear (Maurice's wife and the contingent life beneficiary of the trusts), a state court

judge removed plaintiff from his position as trustee and ordered him to pay substantial damages because of his mismanagement of the trusts. Plaintiff's appeal from that decision remains pending in state appellate court. Claiming that the allegations of mismanagement were frivolous and that his removal had been fraudulently obtained, plaintiff pursued various collateral actions in state court — all without avail. He then turned to federal court, filing the instant civil RICO action against the Shears (and others), seeking injunctive relief and damages on behalf of both himself and the trusts. *See* 18 U.S.C. § 1964(c). The district court, following a hearing, dismissed the complaint for failure to state a claim. Having reviewed the record in full, and having construed the complaint in the light most favorable to plaintiff, *see, e.g.*, *Feinstein* v. *Resolution Trust Corp.*, 942 F.2d 34, 37 (1st Cir. 1991), we now affirm.[1]

Extended discussion is unnecessary. To state a RICO claim, plaintiff was required to allege that defendants conducted an enterprise through a pattern of racketeering activity. *See, e.g.*, *Libertad* v. *Welch*, 53 F.2d 428, 441 (1st Cir. 1995). As well, he was required to allege that he suffered injury in his business or property "by reason of" a RICO violation. 18 U.S.C. § 1964(c); *see, e.g.*, *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 (1985) ("the plaintiff has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation"); *see also Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992) (RICO plaintiff must allege, not only "but for" causation, but also proximate causa-

[1] While we have accepted all well-pled allegations in the complaint as true and drawn all reasonable inferences in plaintiff's favor, there is an inconsistency in his narrative. The Shears' principal motivation for filing the 1987 lawsuit, plaintiff contends, was to remove him as trustee and thereby gain control of the trusts' primary asset — the Mount Pleasant Hospital. Yet plaintiff elsewhere explains that the trusts had sold their interest in the hospital the previous year (and only reacquired ownership thereof in 1991).

tion requiring "some direct relation between the injury asserted and the injurious conduct alleged").

This causation requirement enables us, at the outset, to put to the side vast portions of plaintiff's voluminous complaint. For example, plaintiff has detailed numerous instances of criminal and fraudulent activity allegedly undertaken by various of the defendants during the 1970's and 1980's. Yet no contention is made that such conduct resulted in injury to plaintiff's business or property. In turn, plaintiff charged that defendants have engaged in various misdeeds following his ouster as trustee in January 1992. Again, such actions are not linked to any business or property loss suffered by plaintiff. We note that plaintiff lacks standing to complain of injury to the trusts themselves, having been removed as trustee by the time the instant suit was filed. And the suggestion that his status as a potential creditor of the trusts grants him standing to sue on his own behalf is misplaced. *See, e.g., id.* at 271; *National Enterprises* v. *Mellon Financial Services*, 847 F.2d 251, 254 (5th Cir. 1988).

The only business or property injury alleged in the complaint is that stemming from the state court judgment — i.e., plaintiff's loss of his position as trustee; the accompanying monetary damages; the resulting harm to his reputation and client base; and the legal expenses incurred in litigating that action. The question thus becomes whether plaintiff has set forth a predicate act of racketeering that has proximately caused such injury. Plaintiff insists he has done so in two respects. He argues that the filing by defendants of the state court suit (as part of a broader, unlawful scheme) constituted attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. And he argues that Gertrude Shear, by proffering false affidavits and testimony to the state court (allegedly at the behest of her husband), committed mail fraud in violation of 18 U.S.C. § 1341. We disagree that such claims establish the necessary predicate act.

Numerous courts have held that the filing of litigation — no matter how lacking in merit — does not constitute a

predicate racketeering act of extortion. "If a suit is groundless or filed in bad faith, the law of torts may provide a remedy. Resort to a federal criminal statute is unnecessary." *I.S. Joseph Co.* v. *J. Lauritzen A/S*, 751 F.2d 265, 267-68 (8th Cir. 1984); *accord, e.g., First Pacific Bancorp, Inc.* v. *BRO*, 847 F.2d 542, 545 (9th Cir. 1988); *von Bulow by Auersperg* v. *von Bulow*, 657 F.Supp. 1134, 1143-45 (S.D.N.Y. 1987) (holding that malicious prosecution claim does not constitute predicate act of racketeering). Plaintiff's reliance on *Hall American Center Assocs.* v. *Dick*, 726 F.Supp. 1083 (E.D. Mich. 1989), proves unavailing. The defendants there had engaged in spurious litigation described by the district court as a "clear abuse of process." *Id.* at 1086. The defendants here prevailed in the state court suit. And *Lemelson* v. *Wang Laboratories, Inc.*, 874 F.Supp. 430 (D.Mass. 1994), offers minimal succor to plaintiff, since the court there was addressing the subject of RICO injury rather than predicate acts.

Plaintiff's mail fraud claim likewise proves deficient. For one thing, it lacks the specificity required by Fed. R. Civ. P. 9(b). *See, e.g., New England Data Services, Inc.* v. *Becher*, 829 F.2d 286, 290 (1st Cir. 1987).[2] Moreover, to the extent his argument amounts to the allegation that Gertrude Shear committed perjury, his cause would not be advanced; perjury does not constitute an act of racketeering. *See, e.g., Pyramid Securities, Ltd.* v. *IB Resolution, Inc.*, 924 F.2d 1114, 1118-19 (D.C. Cir.), *cert. denied*, 502 U.S. 822 (1991); *United States* v. *Williams*, 874 F.2d 968, 973 n.17 (5th Cir. 1989).

To be sure, as plaintiff observes, several courts have indicated that a mail fraud claim premised largely on charges

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[2] The suggestion that the information concerning defendants' use of the mails was in their exclusive control — such that plaintiff should be allowed to amend his complaint following further discovery, *see, e.g., Becher*, 829 F.2d at 290 — falls short. As a party to the state court suit, plaintiff obviously was (or should have been) aware of the circumstances surrounding the defendants' submission of allegedly fraudulent affidavits to the court. *See, e.g., Feinstein*, 942 F.2d at 44 ("Although *Becher* may in certain circumstances give a plaintiff a second bite at the apple, its generous formulation is not automatically bestowed on every litigant.").

of perjury can suffice as a predicate act. *See, e.g., United States* v. *Eisen*, 974 F.2d 246, 254 (2d Cir. 1992) ("use of the mail fraud offense as a RICO predicate act cannot be suspended simply because perjury is part of the means for perpetrating the fraud"), *cert. denied*, 113 S.Ct. 1840 (1993); *see also Midwest Grinding Co.* v. *Spitz*, 976 F.2d 1016, 1022-23 (7th Cir. 1992) (leaving question open). Here, however, perjury is said to constitute the entire means for perpetrating the fraud. As well, the *Midwest Grinding* court noted that in cases "allowing perjury to serve as a predicate act [by way of a mail fraud or obstruction of justice allegation], . . . the defendant had either been convicted of perjury before the civil RICO action commenced or had perjury established as a matter of record in a separate proceeding." *Id.* at 1022 n.3 (citations omitted). Nothing of the sort has occurred here; quite to the contrary, the state court deemed Gertrude Shear's evidence credible.

In essence, simply by alleging that defendants' litigation stance in the state court case was "fraudulent," plaintiff is insisting upon a right to relitigate that entire case in federal court (while the case remains pending in the state appellate court). The RICO statute obviously was not meant to endorse any such occurrence. *Cf. Willis* v. *Lipton*, 947 F.2d 998, 1001 (1st Cir. 1991) ("An extension of RICO standing in these circumstances would serve to 'federalize' a substantial volume of common law fraud litigation traditionally left to state courts.").[3]

Affirmed.

[3] Plaintiff's two remaining arguments can be readily rejected. The district court was not required to convert defendants' motion to dismiss into one for summary judgment before taking judicial notice of court papers from the state court litigation. *See, e.g., Edward* v. *John Hancock Mutual Life Ins. Co.*, 973 F.2d 1027, 1030 n.1 (1st Cir. 1992); *Mack* v. *South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Not did it abuse its discretion in denying plaintiff's post-judgment request to amend his complaint (following further discovery), where any such amendment would have been futile. *See, e.g., Arzuaga-Collazo* v. *Oriental Federal Sav. Bank*, 913 F.2d 5, 7 (1st Cir. 1990); *Nodine* v. *Textron, Inc.*, 819 F.2d 347, 349 (1st Cir. 1987).

United States Court of Appeals
For the First Circuit

No. 95-1055

WILLIAM GABOVITCH, ETC.,
PLAINTIFF, APPELLANT,
v.
MAURICE SHEAR, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered: November 21, 1995

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The order of the district court is affirmed.

By The Court:

By JANICE M. O'NEIL
Chief Deputy Clerk.

[cc: Messrs: Gabovitch and Davis]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 94-11992 WGY

WILLIAM GABOVITCH,

Individually, and in his capacity as wrongfully and erroneously removed trustee of the N.M.I. Trust and The Shear Family Trust, and on behalf of The N.M.I. Trust and The Shear Family Trust and all beneficiaries thereof,

Plaintiff,

v.

MAURICE SHEAR; BRUCE A. SHEAR; GERTRUDE SHEAR; WILLIAM F. GRIECO AND BRIAN A. DAVIS,

Individually, and as partners, together with other unknown individuals and professional corporations doing business as Choate, Hall & Stewart, and as interim successor trustees of The N.M.I. Trust and The Shear Family Trust;

CHOATE, HALL & STEWART,

A Massachusetts law partnership;

J. OWEN TODD,

Individually, and as interim successor trustee of The N.M.I. Trust and The Shear Family Trust;

P.H.C., INC.,

A Delaware corporation, formerly known as American International Hospital Services, Inc.,

Defendants.

PLAINTIFF'S MOTION FOR RECONSIDERATION, FOR DISCOVERY, AND FOR LEAVE TO AMEND

YOUNG, D.J.

MOTION DENIED

s/ WILLIAM G. YOUNG
U.S. District Judge
December 26, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No: 94-11992-WGY

GABOVITCH,
PLAINTIFF,
v.
SHEAR,
DEFENDANT.

ORDER OF DISMISSAL

YOUNG, D.J.

In accordance with the Court's allowance of the defendant's motion to dismiss at the hearing on December 12, 1994, it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

s/ ILLEGIBLE
Deputy Clerk

December 12, 1994

To: All Counsel